



Signed and Filed: July 17, 2009

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

|                   |   |                      |
|-------------------|---|----------------------|
| In re             | ) | Bankruptcy Case      |
|                   | ) | No. 08-32429DM       |
| IRENA SAVVON,     | ) |                      |
|                   | ) |                      |
| Debtor.           | ) | Chapter 7            |
|                   | ) |                      |
| J. MATT NAWROCKI, | ) | Adversary Proceeding |
|                   | ) | No. 09-3044DM        |
| Plaintiff,        | ) |                      |
|                   | ) |                      |
| v.                | ) |                      |
|                   | ) |                      |
| IRENA SAVVON,     | ) |                      |
|                   | ) |                      |
| Defendant.        | ) |                      |

MEMORANDUM DECISION RE NONDISCHARGEABILITY

I. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

Plaintiff, J. Matt Nawrocki ("Nawrocki"), filed a complaint against debtor Irena Savvon d/b/a Key Mortgage Group and Savvon Realty ("Savvon") on March 18, 2009, seeking to except from discharge under sections 523(a)(2)(A),<sup>2</sup> 523(a)(2)(B), 523(a)(4),

<sup>1</sup> This Memorandum Decision constitutes the court's findings of fact and conclusions of law pursuant to Rule 7052(a).

<sup>2</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 and 523(a)(6)<sup>3</sup> a debt claimed by Nawrocki. After proper service  
2 of the summons and complaint, Savvon failed to appear. A clerk's  
3 entry of default was granted on May 20, 2009, and the court held a  
4 prove up hearing on the default judgment on June 15, 2009.  
5 Exhibits were entered into evidence and testimony was offered by  
6 Nawrocki. Savvon received notice of the hearing but did not  
7 appear. On June 19, 2009, Nawrocki submitted further evidence and  
8 legal argument, and the court took the matter under submission.  
9 As explained below, the court concludes that Nawrocki's claim is  
10 nondischargeable under sections 523(a)(2)(A) and 523(a)(4) and he  
11 is entitled to a judgment.

12 Nawrocki's complaint and evidence showed the following. In  
13 or around November, 2007, in Montera, California, Savvon, along  
14 with her son, Konstantin Savvon ("Konstantin"), approached  
15 Nawrocki about an investment opportunity which was to make a  
16 short-term secured real property loan for a construction project  
17 in Houston, Texas. The property consisted of four parcels of land  
18 owned by Dallas-Robito, LLC, a Texas limited liability company  
19 ("LLC"). Savvon, along with others, previously owned the property  
20 prior to vesting it in the LLC. Savvon, a licenced real estate  
21 broker in California, agreed to and did act as Nawrocki's mortgage  
22 broker in arranging and negotiating the loan. Nawrocki's loan,  
23 which was needed as interim financing until alternate financing  
24 could be obtained, was to be secured by a deed of trust junior to  
25 a first deed of trust held on the parcels by a party named  
26 Aquilina. The loan was also to be cross-collateralized by

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27 <sup>3</sup> At the prove up hearing, Nawrocki withdrew his 523(a)(6)  
28 claim, and therefore the court makes no determination on it.

1 California real property jointly owned by Savvon and Konstantin,  
2 as well as guaranteed by Konstantin. In effort to attain  
3 Nawrocki's loan, Savvon presented Nawrocki with a written  
4 appraisal, private placement memorandum, and a title report, all  
5 indicating that his loan would be secure. Savvon also made oral  
6 representations to Nawrocki regarding the safety of the loan, that  
7 there were no title issues, that she was actively pursuing  
8 alternate financing, and that Konstantin was credit worthy and had  
9 sufficient assets to be a guarantor. Based on Savvon's  
10 representations, Nawrocki made the loan to the LLC on January 24,  
11 2008, for \$360,000.00.

12 In or around September 2008, Nawrocki discovered the  
13 investment was a sham through conversations with Acquilina's  
14 counsel, Paul Duplechain ("Duplechain"). Alternate financing was  
15 never pursued, the LLC was newly formed with no credit or credit  
16 worthiness, Konstantin's guarantee was only secured by his  
17 interest in the California property, and, most importantly, at the  
18 time Savvon arranged and negotiated Nawrocki's loan in late 2007,  
19 Acquilina's note was already in default with foreclosure pending.  
20 To prove Savvon knew of the existing default and foreclosure at  
21 that time, Nawrocki submitted two emails dated December 10, 2007,  
22 between Savvon and Duplechain clearly showing that Savvon was  
23 aware of, and apparently attempting to fend off, Acquilina's  
24 foreclosure. Savvon never disclosed any of this material  
25 information to Nawrocki prior to his making the loan. Further,  
26 foreclosure notices are not recorded in Texas, and therefore such  
27 information is not revealed in a title report.

28 After learning the truth of the matter, Nawrocki was forced

1 to make forbearance payments to Acquilina in order to stop  
2 Acquilina from closing out Nawrocki's interest in the property.  
3 Upon confronting Savvon about the situation in September-October  
4 2008, she stated that Nawrocki's forbearance payments seemed  
5 excessive considering the several forbearance payments she made to  
6 Acquilina in 2007 were for much less. Nawrocki testified that had  
7 he known about the default on Acquilina's note and pending  
8 foreclosure, he would never have made the loan.

## 9 II. DISCUSSION

10 To except a debt from discharge under section 523(a)(2)(A),  
11 Nawrocki must show: Savvon made oral representations that at the  
12 time she knew to be false; she made those representations with the  
13 intent and purpose to deceive Nawrocki; that he justifiably relied  
14 on her representations; and that he sustained losses as a  
15 proximate result of Savvon's representations. Citibank (South  
16 Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1086 (9th  
17 Cir. 1996); Field v. Mans, 516 U.S. 59, 73-76 (1995). A debtor's  
18 failure to disclose material facts constitutes a fraudulent  
19 misrepresentation under section 523(a)(2)(A) if the debtor was  
20 under a duty to disclose and the debtor's omission was motivated  
21 by an intent to deceive. Harmon v. Kobrin (In re Harmon), 250  
22 F.3d 1240, 1246 n. 4 (9th Cir. 2001).

23 When Savvon represented to Nawrocki in late 2007 and early  
24 January 2008 that his loan would be safe and there were no title  
25 issues, she knew those statements to be false via the December 10,  
26 2007 emails. She also knew of and failed to disclose the material  
27 fact that Acquilina's note was already in default with foreclosure  
28 pending. Her actual knowledge of her false statements or

1 omissions proves her intent to deceive. Advanta Nat'l Bank v.  
2 Kong (In re Kong), 239 B.R. 815, 826 (9th Cir. BAP 1999).

3 Nawrocki justifiably relied on her representations and omissions,  
4 especially in light of the title report, he consequently made the  
5 loan, and sustained losses as a proximate result. Therefore,  
6 Nawrocki's claim is nondischargeable under section 523(a)(2)(A).

7 To except a debt from discharge under section 523(a)(4),  
8 Nawrocki must show: Savvon was acting in a fiduciary capacity, and  
9 while acting in that capacity she engaged in fraud or defalcation.  
10 Lovell v. Stanifer (In re Stanifer), 236 B.R. 709, 713 (9th Cir.  
11 BAP 1999). Whether a relationship is fiduciary in nature under  
12 section 523(a)(4) is a question of federal law and is construed to  
13 apply only to express trust relationships. Id., 236 B.R. at 713.  
14 Fraud within the meaning of section 523(a)(4) means actual fraud  
15 (Roussos v. Michaelides (In re Roussos), 251 B.R. 86, 91 (9th Cir.  
16 BAP 2000)), which is identical to actual fraud under section  
17 523(a)(2)(A). Dakota Steel, Inc. v. Dakota (In re Dakota), 284  
18 B.R. 711, 723 (Bankr. N.D. Cal. 2002). State law determines when  
19 an express trust exists (Ragsdale v. Haller, 780 F.2d at 794, 796  
20 (9th Cir. 1986)), and includes relationships imposed under statute  
21 or common law. Stanifer, 236 B.R. at 714.

22 Under California law, a mortgage broker owes a fiduciary duty  
23 of the highest good faith toward her principal as well as a duty  
24 of full disclosure of all material facts concerning the  
25 transaction that might affect the principal's decision. Barry v.  
26 Raskov, 232 Cal. App. 3d 447, 455 (1991). "The broker owes this  
27 duty to the lender-investor as well as to the borrower." Montoya  
28 v. McLeod, 176 Cal. App. 3d 57, 62-63 (1985). A mortgage broker

1 who is also a real estate agent is charged with the duty of full  
2 disclosure to his or her principals. Id. at 64. The principals  
3 of a mortgage broker are the borrower and lender. Wyatt v. Union  
4 Mortgage Co., 24 Cal.3d 773, 782 (1979). Therefore, California  
5 treats mortgage brokers as fiduciaries and trustees of an express  
6 trust.

7 Here, Savvon acted as a mortgage broker and agent by  
8 arranging and negotiating the loan for her principal, lender-  
9 investor Nawrocki. Although Nawrocki did not cite, and the court  
10 could not locate, a federal case in which the fiduciary nature of  
11 a mortgage broker applied under section 523(a)(4), because  
12 established California law holds that mortgage brokers have a  
13 fiduciary relationship with their lenders and creates an express  
14 trust, the court sees no reason why such a relationship would not  
15 satisfy section 523(a)(4). Consequently, Savvon was a fiduciary  
16 for purposes of section 523(a)(4). Further, as established above  
17 in Nawrocki's section 523(a)(2)(A) claim, her false  
18 representations and failure to disclose the material information  
19 of the default and pending foreclosure, which Nawrocki said had he  
20 known about he would never have made the loan, establishes fraud  
21 for purposes of section 523(a)(4). Accordingly, Nawrocki's claim  
22 is nondischargeable under section 523(a)(4).

23 Nawrocki initially pled the following damages: a loss of  
24 approximately \$450,000.00 to include loss of principal, interest,  
25 and other incidental and consequential damages, such as advances  
26 to Acquilina and other related legal and administrative costs.  
27 His amended summary of damages as of June 15, 2009, prayed for an  
28

1 amount of \$545,421.76.<sup>4</sup> The travel fees to Texas in the amount of  
2 \$1,000.00 are disallowed. Therefore, Nawrocki is entitled to the  
3 following judgment:

|    |                                   |              |
|----|-----------------------------------|--------------|
| 4  | Principal:                        | \$360,000.00 |
| 5  | Pre-Judgment Interest To 7/17/09: | \$ 80,340.00 |
| 6  | Forbearance Payments:             | \$ 81,250.00 |
| 7  | Foreclosure Costs-TX:             | \$ 20,424.96 |
| 8  | Foreclosure Costs-CA:             | \$ 1,776.60  |
| 9  | Attorneys Fees-CA:                | \$ 6,240.00  |
| 10 | Costs:                            | \$ 150.00    |

|    |                        |                     |
|----|------------------------|---------------------|
| 11 | <b>TOTAL JUDGMENT:</b> | <b>\$550,181.56</b> |
|----|------------------------|---------------------|

### 12 III. CONCLUSION

13 Based on the foregoing reasons, Nawrocki's claim against  
14 Savvon shall be nondischargeable under sections 523(a)(2)(A) and  
15 523(a)(4), and he is entitled to a judgment in the amount of  
16 \$550,181.56. Plaintiff's counsel is to draft and upload a  
17 judgment in this amount. Counsel must comply with the provisions  
18 of Rule 9021-1(c).

19 \*\*END OF MEMORANDUM DECISION\*\*

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28 <sup>4</sup> Nawrocki's figure contains a minor mathematical error and  
should have been calculated at \$545,421.56.

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